



**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

RAMON MURILLO,  
CDCR # P-43503

**Plaintiff,**

VS.

P. FLOURNOY; T. GOFF; VILLAROMAN;  
DENNIS MORRIS; CHARLES MARSHAL;  
RJ DONOVAN WARDEN; and JOHN  
DOES 1-5

## Defendants.

Civil No. 11cv1687 BEN (BGS)

**ORDER DIRECTING U.S.  
MARSHAL TO EFFECT SERVICE  
OF FIRST AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. P. 4(c)(3)  
& 28 U.S.C. § 1915(d)**

I.

## PROCEDURAL HISTORY

22 On July 22, 2011, Plaintiff, a state prisoner currently incarcerated at the Richard J.  
23 Donovan Correctional Facility located in San Diego, California and proceeding pro se, filed a  
24 civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff also filed a Motion to Proceed In  
25 Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). On October 11, 2011, the Court  
26 granted Plaintiff’s Motion to Proceed IFP and sua sponte dismissed his Complaint for failing to  
27 state a claim and for lack of proper venue. *See* Oct. 11, 2011 Order at 7-8. On November 29,  
28 2011, Plaintiff filed his First Amended Complaint.

II.

**SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) AND § 1915A**

3 As the Court stated in its previous Order, the Prison Litigation Reform Act (“PLRA”)  
4 obligates the Court to review complaints filed by all persons proceeding IFP and by those, like  
5 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or  
6 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,  
7 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”  
8 See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte  
9 dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails  
10 to state a claim, or which seeks damages from defendants who are immune. See 28 U.S.C. §§  
11 1915(e)(2)(B), 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§  
12 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

13 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
14 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
15 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
16 324 (1989). However, 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court  
17 reviewing an IFP or prisoner's suit make and rule on its own motion to dismiss before effecting  
18 service of the Complaint by the U.S. Marshal pursuant to Federal Rule of Civil Procedure  
19 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits, but requires a district court to dismiss  
20 an in forma pauperis complaint that fails to state a claim."); *see also Barren v. Harrington*, 152  
21 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

22 The Court finds that Plaintiff's claims are now sufficiently pleaded to survive the sua  
23 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff is  
24 entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C.  
25 § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in  
26 [IFP] cases."); FED. R. CIV. P. 4(c)(3) ("[T]he court may order that service be made by a United  
27 States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis*  
28 under 28 U.S.C. § 1915."). Plaintiff is cautioned, however, that "the sua sponte screening and

1 dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6)  
 2 motion that [a defendant] may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119  
 3 (S.D. Cal. 2007).

4 **III.**

5 **CONCLUSION AND ORDER**

6 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

7 1. The Clerk shall issue a summons as to Plaintiff's First Amended Complaint upon  
 8 the remaining Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form  
 9 285 for each of these Defendants. In addition, the Clerk shall provide Plaintiff with a certified  
 10 copy of this Order, the Court's Order granting Plaintiff leave to proceed IFP, and certified copies  
 11 of his First Amended Complaint and the summons for purposes of serving each Defendant.  
 12 Upon receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as  
 13 completely and accurately as possible, and to return them to the United States Marshal according  
 14 to the instructions provided by the Clerk in the letter accompanying his IFP package. Thereafter,  
 15 the U.S. Marshal shall serve a copy of the First Amended Complaint and summons upon each  
 16 Defendant as directed by Plaintiff on each Form 285. All costs of service shall be advanced by  
 17 the United States. *See* 28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3).

18 2. Defendants are thereafter **ORDERED** to reply to Plaintiff's First Amended  
 19 Complaint within the time provided by the applicable provisions of Federal Rule of Civil  
 20 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted  
 21 to "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or  
 22 other correctional facility under section 1983," once the Court has conducted its sua sponte  
 23 screening pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and thus, has made a preliminary  
 24 determination based on the face on the pleading alone that Plaintiff has a "reasonable  
 25 opportunity to prevail on the merits," Defendants are required to respond).

26 3. Plaintiff shall serve upon Defendants or, if appearance has been entered by  
 27 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
 28 submitted for consideration of the Court. Plaintiff shall include with the original paper to be

1 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
2 of any document was served on Defendants, or counsel for Defendants, and the date of service.  
3 Any paper received by the Court which has not been filed with the Clerk or which fails to  
4 include a Certificate of Service will be disregarded.

5 **IT IS SO ORDERED.**

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7 Dated: February 12, 2012

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HON. ROGER T. BENITEZ  
United States District Judge